COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Syngenta AG v. Van Wijngaarden,*
2025 BCCA 334

Date: 20250924
Docket: CA50120

2025 BCCA 334 (CanLII)

Between:

Syngenta AG, Syngenta Crop Protection LLC, Syngenta Canada Inc., and Syngenta Crop Protection AG

Appellants
(Defendants)

And

Johannes Van Wijngaarden and the Estate of Wayne Gionet

Respondents
(Plaintiffs)

Before: The Honourable Mr. Justice Grauer
The Honourable Justice Fleming
The Honourable Justice MacNaughton

On appeal from: An order of the Supreme Court of British Columbia, dated August 9, 2024 (*Gionet v. Syngenta*, 2024 BCSC 1440, Vancouver Docket S217598).

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Place and Date of Hearing: Vancouver, British Columbia
May 8, 2025

Place and Date of Judgment: Vancouver, British Columbia
September 24, 2025

Written Reasons by:
The Honourable Justice MacNaughton

Concurred in by:
The Honourable Mr. Justice Grauer
The Honourable Justice Fleming

Summary:

The appellants appeal an order certifying a Canada-wide class proceeding in battery, and the certification of certain remedial questions. The class proceeding alleges that from the early 1960s to 2017, the appellant marketed and sold in Canada, herbicides containing the active ingredient paraquat and that exposure to paraquat increases the risk of developing Parkinson's disease, a chronic and incurable neurogenerative disease.

The certification judge certified the class proceeding in relation to negligence and battery claims. The appellants did not appeal the certification in negligence, but appealed the certification in battery. They also appealed certified common issues on the appropriateness of general damages, punitive damages, disgorgement, and recovery of health care costs. The appellants sought to have remitted to the certification judge certain hearsay issues.

Held: Appeal allowed in part. The pleadings did not support the certification of a claim in battery. The remedial issues of disgorgement, general and aggravated damages, and liability to pay subrogated health care costs to provincial health care insurers were not suitable to be determined at common issues trial. Disgorgement is not available as a remedy in negligence. General and aggravated damages, and subrogated health care costs are all dependent on a finding of specific causation.

Although the certification judge's approach to hearsay evidence was problematic, there was otherwise sufficient evidence to support her certification decision.

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Reasons for Judgment of the Honourable Justice MacNaughton:

Introduction

[1] The appellants, Syngenta AG, Syngenta Crop Protection LLC, Syngenta Canada Inc. and Syngenta Crop Protection AG (collectively "Syngenta"), appeal from an order certifying this action as a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*].

[2] Syngenta is in the agricultural technology business and, as it relates to this appeal, from the early 1960s to 2017, it and its corporate predecessors marketed and sold in Canada herbicides containing the active ingredient paraquat (the "Gramoxone Products").

[3] Parkinson's disease is a chronic and incurable neurodegenerative condition associated with motor problems and other neurological symptoms.

[4] The plaintiffs claim that exposure to paraquat increases one's risk of developing Parkinson's, and that Syngenta knew or ought to have known of this risk, but failed to disclose it. They applied to certify a class proceeding against Syngenta seeking remedies for negligence, battery, and unjust enrichment on behalf of those who have been diagnosed with Parkinson's after using the Gramoxone Products during the relevant period, and their surviving family members.

[5] In reasons indexed at 2024 BCSC 1440, the chambers judge certified the class proceeding only in relation to the negligence and battery claims. She also certified common issues regarding remedies, including the appropriateness of general damages and punitive damages, disgorgement, and recovery of health care costs under the *Health Care Cost Recovery Act*, S.B.C. 2008, c. 27.

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Issues on Appeal

[6] Syngenta submits that the certification judge erred in three respects:

1. by certifying a common issue in battery, for which the pleadings do not disclose a cause of action;
2. by admitting and relying on hearsay evidence without determining if it fit within a recognized exception; and
3. by certifying remedial issues which cannot be answered in common across the class and/or for which there is no basis in fact.

[7] For the reasons that follow, I would allow the appeal with respect to the first and third grounds, except on the issue of punitive damages. On the second ground of appeal, while the approach to certain affidavit evidence taken here was problematic, Syngenta has failed to show that inadmissible evidence had an impact on any of the certification judge's material findings.

Standard of Review

[8] As this Court explained in *Jiang v. Peoples Trust Company*, 2017 BCCA 119:

> [37] … The standard of review is governed by whether the impugned elements of a certification order are discretionary. To the extent that they are, this Court must review those elements on a highly deferential basis. However, to the extent that the chambers judge's order rests on a question of law, the standard of review is one of correctness (*Low v. Pfizer Canada Inc.*, 2015 BCCA 506 at para. 45).
>
> [38] The identifiable class and preferable procedure requirements involve the exercise of some discretion by the chambers judge. For these requirements an appellate court may only intervene where there is a palpable and overriding error of fact or where there is an error of principle (*Wakelam* at para. 9). However, for the s. 4(1)(a) requirement of whether the pleadings disclose a cause of action, the issue is one of law to be reviewed on a correctness standard (*Wakelam* at para. 8).

[9] This Court recently affirmed the standard of review in *K.O. v. British Columbia (Ministry of Health)*, 2023 BCCA 289 at para. 47.

[10] The decision to certify the plaintiffs' claim and common issue in battery under s. 4(1)(a) of the *CPA* is a question of law, reviewable on a correctness standard.

[11] The judge's decision to certify the remedial claims as common issues under s. 4(1)(c) of the *CPA* was an exercise of discretion, and this Court will interfere only if there has been an extricable error of law, an error in principle, or if the decision was clearly wrong: *Workers' Compensation Board v. Sort*, 2022 BCCA 318 at para. 76.

[12] The identification of evidence as hearsay (or failure to identify evidence as such) is also a question of law, reviewable on a correctness standard: *Surrey (City) v. Kallu*, 2025 BCCA 19 at para. 18.

The Test for Certification

[13] Certification occurs at an early stage in a class proceeding, before examinations for discovery or discovery of documents has taken place.

[14] There are five separate requirements for certification set out in s. 4(1) of the *CPA*:

> **Class Certification**
>
> **4** (1) Subject to subsections (3) and (4), the court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the

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proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

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[15] Whether the class action pleadings disclose a cause of action is reviewed by applying the rule that a pleading should not be struck unless it is plain and obvious that no claim exists. The remaining four certification requirements are reviewed by considering whether there is “some basis in fact” for each of the requirements: *Hollick v. Toronto (City)*, 2001 SCC 68, at para. 25; and *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 [*Pro-Sys* SCC] at paras. 99–105. If the plaintiff discharges this burden, the action must be certified.

[16] The “some basis in fact” standard does not require evidence on a balance of probabilities and does not require that the court resolve conflicting facts and evidence. The evidentiary burden is not an “onerous one”. It reflects that at the certification stage—the pleadings stage—the court is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight: *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503 [*Pro-Sys* BCCA] at para. 65, leave to appeal ref’d [2010] S.C.C.A. 32, quoting *Cloud v. Canada (Attorney General)*, 247 D.L.R. (4th) 667 at para. 50, 2004 CanLII 45444 (O.N.C.A.), leave to appeal ref’d [2005] S.C.C.A. No. 50.

[17] Thus, the certification stage does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action: *Pro-Sys* SCC at para. 102; *Charlton v. Abbott Laboratories, Ltd.*, 2015 BCCA 26 at para. 93.

Certification Decision

[18] The certification judge found that the test for certification under s. 4(1) was met and certified many of the plaintiffs’ proposed common issues for trial. The certified issues are set out in Appendix A.

Disclosing a cause of action

[19] On the first requirement for certification (s. 4(1)(a)), the judge held that the pleadings disclosed a cause of action in negligence and battery, but not for unjust enrichment. Only her conclusion with respect to the cause of action in battery is challenged on this appeal.

[20] In relation to the battery claim, the plaintiffs asserted that because paraquat is a toxic substance that results in neurological damage, exposure to it is *prima facie* harmful or offensive contact. The certification judge accepted this argument on its face and distinguished this case from other toxic exposure cases where intention was not pleaded. The judge held that by pleading that Syngenta was reckless or willfully blind in exposing the plaintiffs to paraquat, the intention requirement for battery was met on the face of the pleadings: paras. 61–62. She found that this distinguished the pleadings from other cases in which a battery action on the basis of toxic exposure was found to be doomed to fail.

Admissibility of Evidence

[21] The judge then turned to the evidence put forward by each party on the other certification requirements.

[22] The plaintiffs sought to introduce the following evidence:

1. Two expert reports (one in response to the defendants' experts) from Dr. Greenamyre, a neurologist, who opined that long-term exposure to paraquat can cause Parkinson's disease;

2. An affidavit from Wayne Gionet (now deceased), the original proposed representative plaintiff;

3. An affidavit from Johannes Van Wijngaarden, the proposed representative plaintiff added after Mr. Gionet's death;

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4. A report from Myles Gordon Cockburn, Ph.D., an epidemiologist who opined that there is epidemiological evidence that paraquat exposure plays a role in the development of Parkinson's disease;

5. Several affidavits from Alex Dimson, a lawyer for the firm representing the plaintiffs, (the "Dimson affidavits") appending:

   a) Pleadings from litigation related to paraquat against Syngenta in the United States;

   b) Documents downloaded from the website of a consumer advocacy group, "US Right to Know", related to paraquat which purport to be:

      i. Scientific studies on paraquat.

      ii. News articles covering topics related to paraquat, including a 1968 article on its introduction to the market, and a 2022 article covering litigation alleging a link between paraquat and Parkinson's disease.

      iii. Internal documents from Syngenta and Imperial Chemical Industries Inc. ("ICI") (a Syngenta corporate predecessor), including internal studies, emails, memos, meeting notes, and presentations.

      iv. Internal documents from another corporation initially involved in selling paraquat in the United States, which is not part of this litigation (the "Paraquat Papers").

   c) Webpages from the Syngenta website, which provide information on paraquat, including a webpage titled "Parkinson's disease and exposure to paraquat";

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d) Historical versions of the Syngenta webpages retrieved using the Wayback Machine, an online tool that advertises itself as a digital archive of the internet;

e) Advertisements for the Gramoxone Products from 1967 through 1985;

f) Documents related to the Gramoxone Products produced to the plaintiffs by Health Canada, primarily consisting of product warning labels;

g) A copy of the trademark registration for Gramoxone in Canada;

h) Re-evaluation notices and briefing notes on Gramoxone and paraquat published by Canada's Pest Management Regulatory Agency ("PMRA");

i) Gramoxone Product labels from 2002, 2016 and 2018; and

j) Press releases from governments outside Canada that have banned or limited the use of paraquat.

[23] After this proceeding was commenced, documents filed in parallel litigation against Syngenta in the United States were unsealed (the "US Litigation"). Mr. Dimson submitted a further affidavit appending documents that he affirms were downloaded from the Superior Court of California website, including:

1. Transcripts of the depositions of Dr. Phillip Botham, Syngenta's corporate representative in the US litigation, taken on a number of dates between February 25, 2020 and June 17, 2020 and on February 15 and 16, 2022.

2. Some of the same documents earlier introduced purporting to be Syngenta and ICI internal documents, this time retrieved from the court file in the US litigation.

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[24] The defendants relied on their own evidence:

1. An expert report from Dr. Mandar Jog, a neurologist, who opined that there is no evidence that paraquat can cause an individual to develop Parkinson's disease;

2. An expert report from Victoria Amy Kirsh, Ph.D., an epidemiologist, who opined that the epidemiological evidence does not support a relationship between paraquat exposure and Parkinson's disease; and

3. Two affidavits from Dr. Anna Shulkin, the Head of Crop Protection Regulatory and Stewardship for Syngenta Canada Inc., and Syngenta's corporate representative in the proceedings.

[25] Dr. Greenamyre and Dr. Jog were both cross-examined, and the transcripts of their cross-examinations were tendered to the certification judge.

[26] The certification judge started with the main evidentiary dispute, which was the content of the Dimson affidavits. She held that Mr. Dimson's argument on the legal criteria for certification was clearly inadmissible, as was "any of his commentary and opinion regarding the exhibits attached to his affidavits": para. 71.

[27] The judge held that the exhibits to the Dimson affidavits were admissible, for different purposes. First, she held that the deposition transcripts from Dr. Botham were admissible as party admissions for the truth of their contents. This holding is not contested on appeal. Second, she held that the other exhibits were admissible not for the truth of their contents, but to "corroborate and situate the plaintiffs' expert evidence", construct a frame of reference for other facts, and explain events that followed: paras. 83–86. Third, the judge held that certain "report evidence" was admissible "under the exception for public documents": para. 87.

[28] The judge admitted the remaining evidence, including the expert reports. However, she placed less weight on the evidence of Syngenta's corporate representative, Dr. Shulkin. She did so because by not disclosing relevant

information, later revealed in the Botham transcripts, including that Syngenta itself had replicated the findings of a study that Dr. Shulkin criticized: paras. 95–98, Syngenta had not complied with the requirement under s. 5(5) of the *CPA* to set out all material facts relevant to the application.

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[29] Based on the above evidence, the certification judge found that the remaining criteria for certification were met. She found that there was an identifiable class as required by s. 4(1)(b), who would benefit from an answer to the question of whether the paraquat in the Gramoxone Products causes Parkinson's disease in humans.

[30] On the common issue requirement, s. 4(1)(c), the judge held that the evidence supported certifying common issues related to whether paraquat in the Gramoxone Products causes Parkinson's, whether Syngenta had a duty to warn and a duty of care, and whether and when Syngenta breached these duties, including whether and when it knew that there was a causal relationship between the Gramoxone Products and Parkinson's.

[31] The plaintiffs' expert evidence provided a description of the mechanism by which paraquat could enter the brain and lead to the development of Parkinson's disease. It also provided support for the assertion that Syngenta ought to have known that this was a risk of the Gramoxone Products.

[32] The judge also certified a common issue in battery, finding that whether exposure to paraquat constitutes offensive contact could be decided in common.

[33] The judge further certified questions on whether general damages, punitive damages, restitution, and provincial health care costs recovery were appropriate remedies: paras. 179–189. The judge reasoned that general damages could be determined by sampling the harm experienced by individual class members and assessing a base amount of non-pecuniary damages. The question of punitive damages could be bifurcated, so that at the common issues trial, the conduct of Syngenta would be assessed, while the question of entitlement and amount would be saved for individual trials. On restitution, she reasoned that the Supreme Court of

Canada held that disgorgement was available for “deceit” and that there was some evidence supporting that Syngenta had acted deceptively here. On health care recovery costs, the judge noted that the Province of British Columbia had retained the plaintiffs’ law firm for the purposes of recovering health care costs related to the action, and that there was “some basis in fact” that this question could be answered on a class-wide basis.

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[34] The judge held that the preferable procedure requirement set out in s. 4(1)(d) was also met. The judge acknowledged that establishing specific causation, i.e., that paraquat caused or contributed to a particular plaintiff’s Parkinson’s disease, may require individual actions: paras. 194–196. However, the plaintiffs had shown a workable methodology to answer the question of general causation, i.e., whether paraquat can cause Parkinson’s in humans generally: para. 198. A single action answering this question would significantly assist all class members, even if other issues remained to be decided on an individual basis. She noted that the alternative means of advancing the claim would be individual actions, which would be prohibitively expensive for the plaintiffs on their own, especially considering that the plaintiffs suffer from a neurogenerative disease: paras. 203–208.

[35] Finally, the judge held that the plaintiffs had presented a suitable representative plaintiff, and an appropriate litigation plan, meeting the requirement under s. 4(1)(e).

Position of the Parties on Appeal

Syngenta

[36] Syngenta submits that the certification of an issue in battery was wrong in law because the facts pleaded do not disclose a cause of action as required by s. 4(1)(a). In particular, they argue that putting a product into the stream of commerce does not meet the threshold of “direct contact”, which is a requirement for any battery claim.

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[37] Second, Syngenta submits that the certification judge erred in her treatment of the exhibits to the Dimson affidavits, apart from the Botham transcripts, which, on appeal, they concede are admissible. They submit that the judge misstated the public records exception and that documents said to be admitted for context or background were in fact admitted and relied upon for their truth. The proper remedy is to remit the matter to the certification judge for a new ruling on the admissibility of the documents and “on the basis of admissible evidence only, to reconsider the Certification Order”.

[38] Finally, Syngenta submits that the certification judge erred in certifying remedial common issues related to restitution, general damages, punitive and aggravated damages, and healthcare costs recovery. They argue that restitution is not available here, because the plaintiffs’ claim for unjust enrichment was not certified. They say the remaining questions on the remedial issues cannot be answered in common and thus should not have been certified. On the issue of punitive damages, they add that there is no admissible evidence which would provide “some basis in fact” for a punitive damages award.

Plaintiffs

[39] The plaintiffs assert that although their claim in battery is novel, it is not plain and obvious that it will not succeed. They say that the certification judge correctly distinguished their claim from other toxic exposure cases where a battery claim was struck out.

[40] Second, the plaintiffs submit that the judge properly applied the law when it comes to the main evidentiary fight, which was with respect to the Botham transcripts. They further argue that the documents, which purport to be internal Syngenta documents, or those of its predecessor, are properly admissible as party admissions. They say that the appellants cannot argue that these documents are inauthentic, because they never took that position at the hearing below, and because the requirement to disclose any material facts under s. 5(5) of the *CPA*

means that Syngenta had an obligation to state in their affidavit whether these documents were internal Syngenta documents.

[41] Finally, the plaintiffs submit that the remedial issues were properly certified. The plaintiffs concede that restitution was not an available remedy. However, they submit that the certification judge intended to certify a common issue on disgorgement and the use of the term restitution was a technical error that this Court can correct. They submit that the question on general damages is appropriate, because the causal connection between paraquat and Parkinson’s disease is so strong that specific causation can be assumed if their evidence is accepted. Finally, they say that a bifurcated approach to punitive and aggravated damages, as set out by the certification judge, addresses the concerns that Syngenta has raised.

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Analysis

Certification of battery common issues

[42] Battery, included in the tort of trespass to the person, is “the intentional infliction of unlawful force on another person”: *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 at 246, 1992 CanLII 65 *per* La Forest J. for the majority.

[43] Unlike negligence, which may involve complex issues of causation and remoteness, battery was traditionally confined to direct interference with bodily security. It does not require proof of causation—see, for instance, *Reibl v. Hughes*, [1980] 2 S.C.R. 880 at 890.

[44] In *Non-Marine Underwriters, Lloyd’s of London v. Scalera*, 2000 SCC 24 at para. 7, Justice McLachlin (as she then was) considered and concluded that the Court should not depart from the “settled rule” that requires a plaintiff in a battery claim to show contact through a direct and intentional act of the defendant only, and places the burden on the defendant of showing actual or constructive consent, or lawful excuse.

[45] Justice McLachlin distinguished battery from negligence:

> [11] I agree with Sullivan's view that the traditional approach to trespass to the person remains appropriate in Canada's modern context for a number of reasons. First, unlike negligence, where the requirement of fault can be justified because the tortious sequence may be complicated, trespass to the person is confined to direct interferences.

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[46] Since *Scalera*, Canadian courts have confirmed that battery requires direct contact between the plaintiff and the defendant. It is this direct contact—and the resulting violation of personal autonomy—that justifies the modified burden of proof in an action for battery. The plaintiff has no burden to show that the defendant was at "fault". They need only show direct, offensive, physical contact with the plaintiff, and that this contact is the immediate cause of harm to the plaintiff. If the plaintiff meets their burden, the onus shifts to the defendant to prove consent.

[47] In *Palmer v. Teva Canada Ltd.*, 2022 ONSC 4690 [*Palmer* SC], a proposed class action, the plaintiffs sued various pharmaceutical companies that manufactured valsartan, a high blood pressure medication, because certain Chinese-manufactured lots of valsartan were contaminated with chemicals shown to increase the risk of cancer in humans. The certification judge refused to certify the plaintiffs' class action for pure economic losses based on an alleged increased risk of being diagnosed with cancer from the contamination, absent proof of any concrete injuries.

[48] As relevant here, in *Palmer* SC the certification judge also refused to certify a claim in toxic battery. Relying in part on *Scalera*, the certification judge concluded that it was "plain and obvious that there is no certifiable battery cause of action". His decision was appealed.

[49] In *Palmer v. Teva Canada Limited*, 2024 ONCA 220 [*Palmer* CA], the Ontario Court of Appeal described the tort of battery as follows:

> [81] The tort of battery protects bodily integrity. It asserts the right of persons to control their bodies, and allows damages where a person interferes with the body of another: *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551, at para. 15. A battery

> occurs when a defendant causes a direct, offensive, physical contact with the plaintiff, which is the immediate cause of the harm to the plaintiff: *Barker v. Barker*, 2022 ONCA 567, 162 O.R. (3d) 337, at paras. 138 and 154. Directness is an essential requirement for liability: *Non-Marine Underwriters*, at para. 11. Although battery is often conceived of as an intentional tort, battery can be committed either intentionally or negligently…
>
> [Emphasis added.]

[50] The Court concluded that:

> [82] Nothing done directly by the respondents is alleged to be the immediate cause of the harm alleged by the appellants. At best, the pleadings allege that the respondents "exposed" the plaintiffs to the contaminated valsartan, but exposure is not direct physical contact. Although the appellants' claim seems to sound in negligence, negligent battery nevertheless requires directness. The appellants have provided no theory to address this constituent element of their claim in battery. Neither have they pleaded material facts in support. Moreover, there is no authority that a battery can be committed by a failure to act, which is what is here alleged. Accordingly, I see no error in the motion judge's ultimate conclusion that there was no certifiable cause of action in battery.
>
> [Emphasis added.]

[51] In my view, the certification judge here fell into error by failing to engage with the requisite legal element of directness in the tort of battery. She wrote:

> [56] The plaintiffs plead that the defendants engaged in harmful and offensive contact by causing the Class Members to be exposed to paraquat, which they say is an offensive contaminant with a propensity to cause injury, beyond that which would be ordinarily expected in day-to-day life. …
>
> …
>
> [62] The plaintiffs do not plead that Syngenta intended to cause any physical consequences for the plaintiffs or any Class Member. However, they do plead that the defendants have been willfully blind or recklessly indifferent to whether the Gramoxone products cause Parkinson's disease. This is different from other "toxic battery" pleadings rejected by courts as poorly disguised unintentional negligence claims. Unlike the allegations in *Palmer v. Teva Canada Ltd.*, 2022 ONSC 4690 at paras. 219–222, which alleged inadvertent acts, the plaintiffs here specifically plead wilful blindness and reckless indifference.
>
> [63] I cannot say that the plaintiffs claim in battery is bound to fail for failing to plead the requisite elements of the tort. Specifically, in addition to the other elements adequately plead, there are allegations which impute intent to cause harmful or offensive contact on the part of the defendants.

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[52] Exposure, in my view, does not satisfy the requirement of directness for the tort of battery. In that respect, I agree with *Palmer* CA at para. 82.

[53] Where the element of "directness" is absent, courts strike claims for battery. In *Barker v. Barker*, 2022 ONCA 567 at paras. 138 and 154, cited in *Palmer* CA (at para. 81), the plaintiff claimed in battery against physicians who designed and implemented an involuntary treatment program. The Court struck the battery claims against the physicians who designed the program and allowed it to proceed only against those physicians who directly administered the drugs to the plaintiffs:

> [154] In this case, with the exception of the nine respondents to whom the Physicians directly administered DDT drugs, it cannot be said that anything done directly by the Physicians was the immediate cause of the harm that befell the respondents. The respondents' submission that the violation of the other respondents' bodily integrity was the "immediate consequence of a force set in motion by an act of the defendant[s]" fails on the modifier "immediate".

[54] Plaintiffs have attempted, in the context of product liability cases involving exposure to chemicals, to expand the tort of battery beyond the confines set out by the Supreme Court in *Scalera*. To date, these efforts have been unsuccessful because they do not involve direct, offensive, physical contact between the defendant manufacturers and the plaintiffs.

[55] In *DeBlock v. Monsanto Canada ULC*, 2023 ONSC 6954, the plaintiffs sought to certify a class action in battery alleging that the defendants produced, marketed, distributed, and sold herbicide products containing a cancer-causing synthetic compound called glyphosate. Relying on *Norberg* and *Scalera*, the certification judge concluded that "directness" is an essential element for liability in battery and that "interference" is direct if it is the immediate consequence of a force set in motion by an act of the defendant: paras. 28–29. The judge concluded:

> [41] In my view, the defendants' argument concerning directness carries the day. This court is bound by the majority decision in *Scalera*…
>
> [42] I recognize that the Claim alleges that significant exposure to an herbicide containing glyphosate was a "direct result" of the actions of the defendants. However, form does not prevail over substance.

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> In *Scalera*, *supra* separate reasons were given by Iacobucci J. At para. 50, he addressed this point by saying:
>
> > A plaintiff cannot change an intentional tort into a negligent one simply by choice of words, or vice versa … [A] court must look beyond the choice of labels and examine the substance of the allegations contained in the pleadings. This does not involve deciding whether the claims have any merit; all a court must do is decide, based on the pleadings, the true nature of the claim.

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[56] In their third amended notice of civil claim, dated November 14, 2023, the plaintiffs plead:

> [64] The Plaintiffs were diagnosed with Parkinson's disease after exposure to Gramoxone Products that were manufactured, distributed, and/or sold by the Defendants. The Defendants knew (or should have known) that exposure to paraquat caused Parkinson's disease. However, the Defendants placed Gramoxone Products into the stream of commerce without warnings to such effect. The Defendants knew that persons applying Gramoxone would absorb paraquat into their bodies. The Defendants therefore caused the Plaintiffs to be exposed to a harmful substance, increasing the risk that they would develop Parkinson's disease.
>
> [65] The Plaintiffs did not consent to an increased risk of Parkinson's disease, as the Defendants did not warn of this risk. The Plaintiffs would not have exposed themselves to Gramoxone Products if they had known it could cause Parkinson's disease. The Plaintiffs did not consent to the Defendants' contamination of their bodies with paraquat.
>
> [66] The Defendants have at all times been willfully blind or recklessly indifferent to whether Gramoxone Products cause Parkinson's disease.
>
> [67] As a direct result of the Defendants' wrongful acts, the Plaintiffs and the Class Members were exposed to Gramoxone Products. The Defendants caused a harmful substance to contaminate the Plaintiffs and Class Members bodies without consent as to the risk that this substance could cause Parkinson's disease. Consequently, the Defendants have committed a battery against the Plaintiffs and the Class Members. The Family Class Members have experienced personal and financial losses resulting from their family members' illness.
>
> [Emphasis added.]

[57] Accepting that *Scalera* requires direct contact as an element of the tort of battery, exposure cannot, in my view, meet this requirement. Justice Iacobucci's comments apply here with equal force. It is not enough to say, as the plaintiffs plead, that by putting herbicide containing paraquat into the stream of commerce, the requirement of "directness" is satisfied. There are numerous stages between the

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start of the stream and its end with the plaintiffs. We are left, in essence, with a disguised negligence claim.

[58] The plaintiffs' reliance on *Scott v. Shepherd (1773)*, 2 Black W 892, 96 ER 525 (KB), a decision from the 18th century, before the modern development of the law of negligence, does not persuade me to depart from *Scalera.*

[59] It follows that, since the plaintiffs do not have a claim in battery, it was an error to certify a common issue in battery.

Evidentiary issues

Procedure for admitting evidence at certification hearings generally

[60] An application for certification in British Columbia must be supported by affidavit evidence: s. 5(1). This evidence is assessed on the standard of whether it establishes "some basis in fact" for the certification requirements, other than the requirement that the pleadings disclose a cause of action: *Hollick* at para. 25.

[61] The focus of the "some basis in fact" analysis is on the form of the action, rather than the merits of the claim: *Hollick* at para. 16. In other words, the question is whether it is appropriate that the action go forward as a class proceeding, not whether the claims are likely to succeed: *Pro-Sys* SCC at para. 105. Certification applications are, at their core, pleadings motions.

[62] As noted above, at para. 16, the evidentiary burden is not an "onerous one".

[63] However, the rules of evidence themselves are not relaxed on a certification application: *Ernewein v. General Motors of Canada Ltd.,* 2005 BCCA 540 at para. 31, leave to appeal to SCC ref'd. 31218 (23 March 2006). To be admissible at a certification hearing, evidence must be otherwise admissible. In other words, it must be relevant, not subject to any exclusionary rule, and more probative than prejudicial: *R. v. Calnen*, 2019 SCC 6 at para. 107; see Sidney N. Lederman, Michelle K. Fuerst & Hamish C. Stewart, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 6th ed (Toronto: LexisNexis Canada Inc, 2022) at § 2.02.

[64] In the context of this appeal, the rules governing the admission of opinion evidence and hearsay are worth repeating.

[65] Opinion evidence is only admissible in certain circumstances. Lay people may give opinion evidence in limited circumstances: *Graat v. The Queen*, [1982] 2 S.C.R. 819, at p. 835, 1982 CanLII 33. Otherwise, to be admissible, opinion evidence must: be relevant to an issue; be necessary to assist the trier of fact; not contravene an exclusionary rule; and be from a witness properly qualified as an expert: *R. v. Mohan*, [1994] 2 S.C.R. 9 at 20-25, 1994 CanLII 80.

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[66] Even evidence which meets this threshold may be excluded if the potential risk of its admission outweighs its benefits: *White Burgess Langille Inman v. Abbott and Haliburton Co.,* 2015 SCC 23 at para. 24. As explained by Justice Cromwell in *White Burgess*, this framework recognizes the unique dangers of admitting opinion evidence:

> [18] The point is to preserve trial by judge and jury, not devolve to trial by expert. There is a risk that the jury "will be unable to make an effective and critical assessment of the evidence": *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, at para. 90, leave to appeal refused, [2010] 2 S.C.R. v. The trier of fact must be able to use its "informed judgment", not simply decide on the basis of an "act of faith" in the expert's opinion: *J.-L.J.*, at para. 56. The risk of "attornment to the opinion of the expert" is also exacerbated by the fact that expert evidence is resistant to effective cross-examination by counsel who are not experts in that field: *D.D.*, at para. 54. The cases address a number of other related concerns: the potential prejudice created by the expert's reliance on unproven material not subject to cross-examination (*D.D.*, at para. 55); the risk of admitting "junk science" (*J.-L.J.*, at para. 25); and the risk that a "contest of experts" distracts rather than assists the trier of fact (*Mohan*, at p. 24). Another well-known danger associated with the admissibility of expert evidence is that it may lead to an inordinate expenditure of time and money: *Mohan*, at p. 21; *D.D.*, at para. 56; *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 S.C.R. 387, at para. 76.
>
> [Emphasis added.]

[67] Out-of-court statements tendered for the truth of their contents—hearsay—are presumptively inadmissible: *R. v. Bradshaw*, 2017 SCC 35 at para. 1. The truth of these statements is inherently difficult to assess because they are not made under oath, and there is no opportunity to contemporaneously cross-examine the

declarant: *Bradshaw* at para. 20. Therefore, the party tendering hearsay must show that it fits within a recognized exception or that it is sufficiently reliable and necessary: *R. v. Mapara*, 2005 SCC 23 at para. 13.

[68] One exception to the rule against hearsay is provided for in the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, R. 22-2(13) as follows:

> **Exception**
>
> (13) An affidavit may contain statements as to the information and belief of the person swearing or affirming the affidavit, if
>
> (a) the source of the information and belief is given, and
>
> (b) the affidavit is made
>
> (i) in respect of an application that does not seek a final order, or
>
> (ii) by leave of the court under Rule 12-5 (71) (a) or 22-1 (4) (e).

[69] This rule applies to certification applications. However, as the affiant must identify the source of information and swear or affirm that they believe the information to be true, double hearsay remains inadmissible: *Albert v. Politano*, 2013 BCCA 194 at paras. 19–22. The “source” of the information under this rule must be an “identified person” and not a reference to a group of people or a corporation: *Albert* at para. 21; see also *Sharp v. Royal Mutual Funds Inc.,* 2019 BCSC 2357 at paras. 28–34.

[70] With the foregoing in mind, there are many problems with the approach taken in this case in respect of the Dimson affidavits that appended hundreds of documents, retrieved from various online sources, to the affidavit of a lawyer who has no personal knowledge concerning their truth or authenticity, and in many cases was not even the person who retrieved them. This tactic has been appropriately criticized by certification judges in other cases: see *C.D. v. Facebook, Inc. (Meta Platforms Inc.),* 2024 BCSC 2081 at para. 19; *Harris v. Bayerische Motoren Werke Aktiengesellschaft,* 2019 ONSC 5967 at para. 42.

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[71] In *C.D.,* the plaintiffs tried to introduce a series of articles published in the Washington Street Journal and on a tech blog (Gizmodo), which reviewed and published supposedly “leaked documents” belonging to the defendant, by appending them to the affidavit of a legal assistant for the law firm representing the plaintiffs. Justice Tammen granted the defendant’s motion to strike the exhibits and parts of the affidavit, noting:

> [20] Perhaps most critically, the plaintiffs failed to come to grips with the fundamental issue with both the WSJ Documents and Gizmodo Documents, namely a Gordian knot of hearsay and authentication problems. The issue was clearly identified at paragraph 3 of the “Overview” section of the defendants’ [Notice of Application]. After describing much of the plaintiffs’ evidence as “unauthenticated triple hearsay presented in a factual vacuum”, the [Notice of Application] states: “The paralegal who appended these unauthenticated third-party documents to her affidavit has no personal knowledge whatsoever about the underlying documents or their authenticity.” That is a factually correct statement.

[72] A “Gordian knot of hearsay and authentication problems” is an apt characterization of difficulties presented by many of the exhibits to the Dimson affidavits. As I will explain, the manner in which the plaintiffs sourced and tendered the non-transcript Dimson exhibits raises overlapping authentication, hearsay, and relevance issues. These issues could not be overcome by simply admitting the documents not for their truth.

[73] In the face of the defendants’ objections to the exhibits’ admissibility, it was incumbent on the plaintiffs to provide some admissible evidence supporting their authenticity and either outline why individual documents should be admitted under a known hearsay exception or identify their relevance for a non-truth purpose.

[74] In the absence of this assistance from the plaintiffs, the certification judge erred in admitting the non-transcript Dimson exhibits in the manner that she did, including in setting out the public records exception.

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Authentication

[75] On appeal, the plaintiffs argue that, to the extent that the certification judge relied on documents purporting to be internal Syngenta documents for their truth, she was entitled to do so because they are party admissions. The party admissions exception to the rule against hearsay applies to "acts or words of a party offered as evidence against that party": *R. v. Schneider*, 2022 SCC 34 at para. 52, quoting D. M. Paciocco, P. Paciocco and L. Stuesser, *The Law of Evidence* (8th ed. 2020) at 191.

[76] Documents being tendered as party admissions must first be authenticated: *R. v. Evans,* [1993] 3 SCR 653, 1993 CanLII 86. Authentication of documents requires that the party seeking to introduce the document provide evidence capable of supporting a finding that the document is what it purports to be: *British Columbia (Securities Commission) v. Alexander*, 2013 BCCA 111 at para. 65.

[77] Mr. Dimson's affidavits do not provide this foundation. For example, Mr. Dimson deposes in his affidavit #1 that he has been "advised by Mr. Planeta that certain documents related to paraquat have been published online by the investigative research group U.S. Right to Know ("USRTK")". Mr. Planeta is counsel for the plaintiffs. There are multiple levels of hearsay between Mr. Dimson, the person stating that the documents are authentic Syngenta documents (who is an unnamed member of USRTK), and the author of the documents themselves (also, in many cases, not identified).

[78] The plaintiffs do not appear to dispute that the information in Mr. Dimson's affidavit is insufficient to authenticate many of the documents he attaches. Instead, on appeal, the plaintiffs argue that Syngenta had a duty to determine if the documents were authentic and to file evidence on the issue of authenticity at the certification hearing. Their argument is premised on s. 5(5) of the *CPA*, which

requires parties to disclose all material facts in their knowledge through affidavit evidence:

> **Certification application**
>
> **5** (1) An application for a certification order under section 2 (2) or 3 must be supported by an affidavit of the applicant.
>
> (2) A copy of the notice of application and supporting affidavit must be filed and
>
> (a) served by ordinary service on all persons by whom or on whose behalf a pleading has been filed in the proceeding, and
>
> (b) served by personal service on any other persons named in the style of proceedings.
>
> (3) Unless otherwise ordered, there must be at least 14 days between
>
> (a) the service of a notice of application and supporting affidavit, and
>
> (b) the day named in the notice of application for the hearing.
>
> (4) Unless otherwise ordered, a person to whom a notice of application and affidavit is served under this section must, not less than 5 days or such other period as the court may order before the date of the hearing of the application, file an affidavit and serve a copy of the filed affidavit by ordinary service on all persons by whom or on whose behalf a pleading has been filed in the proceeding.
>
> (5) A person filing an affidavit under subsection (2) or (4) must
>
> (a) set out in the affidavit the material facts on which the person intends to rely at the hearing of the application,
>
> (b) swear that the person knows of no fact material to the application that has not been disclosed in the person's affidavit or in any affidavits previously filed in the proceeding, and
>
> (c) provide the person's best information on the number of members in the proposed class.

[79] The plaintiffs submit that whether the documents are authentic is a material fact that Syngenta had a duty to put into evidence through the affidavit of its corporate representative. The plaintiffs submit that because Syngenta did not do so, it cannot object to the admissibility of the documents on appeal.

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[80] The plaintiffs do not point to any authority which supports this interpretation of s. 5(5) of the *CPA*. In my view, a plain reading of this section does not support an intention to reverse a basic and long-standing rule of evidence that requires the party tendering a document to authenticate it.

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[81] While I recognize the potential unfairness in asking the plaintiffs to authenticate documents which they believe are in the defendants' possession, without being able to discover the defendants, in my view the plaintiffs had adequate tools at their disposal to overcome this. In particular, the plaintiffs could have made use of R. 31(1) of the *Supreme Court Civil Rules*, which allows a party to request that another party admit the authenticity of a document specified in the notice. Delivering a notice to admit places a burden on the receiving party to specifically deny the authenticity of the document or set out detailed reasons why its authenticity cannot or will not be admitted by that party: R. 31(2). An unreasonable refusal to admit exposes the refusing party to costs consequences, including being ordered to pay the cost of proving the authenticity of the document: R. 31(4). This rule applies to class proceedings before certification: see, e.g., *Sibble v. Google LLC*, 2025 BCSC 537 at paras. 80–81.

Relevance of other documents

[82] Relevance is a necessary threshold for admissibility: *Schneider* at para. 38. Evidence is relevant if it tends to prove or disprove a fact in issue or if it assists in assessing the probative value of other relevant evidence: see *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20 at para. 57.

[83] If a document is not being tendered for the truth of its contents, it must be relevant for another purpose: *R. v. Wright*, 2013 BCCA 70 at para. 42. At the certification hearing, the plaintiffs submitted that the non-transcript exhibits to the Dimson affidavits were not being tendered for the truth of their contents: para. 83. For some of the documents, the plaintiffs articulated a non-truth purpose.

For example, the certification judge accepted that a Canadian regulatory decision on paraquat was admissible to give context to the regulation of the herbicide in Canada:

> [84] Many of these other exhibits corroborate and situate the plaintiffs' expert evidence and respond to the defendants' challenges on whether the plaintiffs have met the "some basis in fact" standard.
>
> [85] For example, the defendants take issue with a [Pest Management Regulatory Agency] review decision to situate the present-day regulation of Gramoxone Products in Canada. They also take issue with the plaintiffs offering examples of other regulatory reports in response to the defendants' reliance on a U.S. government report. These are what the Supreme Court of Canada has called "social facts" rather than "adjudicative facts"—facts used to construct a frame of reference for placing otherwise asserted facts in context: *Araya v. Nevsun Resources Ltd.*, 2016 BCSC 1856 at paras. 169–172, aff'd 2017 BCCA 401 at para. 101, citing *R. v. Spence*, 2005 SCC 71 at para. 58.
>
> [86] This Court endorsed this approach in the class proceedings context in *McEwan v. Canadian Hockey League*, 2022 BCSC 1104, where it found similar evidence may be admissible to demonstrate a person's state of mind, further a narrative, or explain events that follow: at para. 36.

[84] However, the non-truth purpose for tendering many of the other documents, and therefore their relevance, is unclear. For example, one of the documents attached to the Dimson affidavits, downloaded from the Paraquat Papers, appears to be a 2022 news article published in the *Guardian*, titled "Secret files suggest chemical giant feared weedkiller's link to Parkinson's disease". The article's author claims to have reviewed internal Syngenta documents and writes that the documents "suggest the public narrative [on paraquat] put forward by Syngenta and the corporate entities that preceded it has at times contradicted the company's own research and knowledge". It is difficult to see how the fact that this 2022 news article was published, and not its truth, could be relevant to proving any of the plaintiffs' claims. While out-of-court statements may be relevant to explain a party's state of mind or later actions, the plaintiffs did not suggest that this article came to Syngenta's attention or that it impacted Syngenta's behaviour in any way: *R. v. Delellis*, 2019 BCCA 335 at paras. 111–115; and *R. v. Khelawon*, 2006 SCC 57 at para. 36.

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[85] Similarly, it is unclear how the documents, which purport to be internal Syngenta documents, could be relevant if they were not authenticated as such.

[86] Recognizing that the admissibility of many of the documents was contentious, the plaintiffs in this case should have particularized their position on which documents were admissible under a known hearsay exception, and which were admissible for another purpose and what that purpose was. This was particularly important because of the sheer volume of the material they sought to introduce: the Dimson exhibits contain hundreds of documents, stretching to thousands of pages.

[87] It is unreasonable to expect a certification judge, in this context, to undertake the process of itemizing and categorizing the documents, without the parties' assistance. Without such assistance, the judge cannot possibly know upon what exceptions and purposes the plaintiffs purport to rely. Admitting the documents wholesale, without the ability to analyze their authenticity and relevance, is an error in such circumstances.

Public record exception

[88] The plaintiffs did not seriously dispute on appeal that the certification judge erred in applying the public record exception to the hearsay rule.

[89] The public documents exception applies to written statements prepared by public officials in the exercise of their public duty: *R. v. Finestone*, [1953] 2 S.C.R. 107. The underlying rationale for the exception is based on necessity and reliability. Admitting a public document is considered necessary to prove the information therein to relieve public officials of being compelled to give testimony on events they are unlikely to have an independent recollection of: *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* at 6.333.

[90] The reliability of the document generally comes from the fact that it was created during the course of a public official's duties, and the fact that the document

was prepared to be publicly available. The party raising this exception must therefore show that the following pre-conditions are met:

1. The subject matter of the statement must be of a public nature.

2. The statement must have been prepared with a view to being retained and kept as a public record.

3. It must have been made for a public purpose and available to the public for inspection at all times.

4. It must have been prepared by a public officer in pursuance of his or her duty.

Sopinka, Lederman & Bryant: *The Law of Evidence in Canada*, at ¶6.331.

[91] However, even where the above criteria are met, the judge may still refuse to admit a public document for its truth if it is not reliable for this purpose. As outlined by Perell J. in *Levac v. James*, 2016 ONSC 7727, rev'd on other grounds 2017 ONCA 842, the caselaw in this area reveals that:

> [122] …the criteria for the hearsay exception are surrogates for the court being satisfied that the information provided by the public officials in pursuit of their public duties is **reliable and trustworthy information that may be fairly admitted for the truth of its contents**. If in the circumstances of the particular case, the court is not satisfied about the reliability of the public document or if the court concludes that the admission of the evidence would be unfair, then the court may refuse to admit the evidence notwithstanding that the criteria for admissibility for a public document have been satisfied.
>
> [Emphasis added.]

[92] Here, the certification judge set out and applied the exception as follows:

> [87] … The report evidence is also admissible under the exception for public documents. In *Sharp v. Royal Mutual Funds Inc.*, 2019 BCSC 2357 [*Sharp BCSC*], two affidavits consisting entirely of appended exhibits of publicly accessible online documents were admitted as public documents: at paras. 26, 36–39, aff'd 2021 BCCA 307 [*Sharp BCCA*], leave to appeal to SCC ref'd, 39882 (15 March 2022). Likewise, in *Huebner v. PR Seniors Housing Management Ltd., D.B.A. Retirement Concepts*, 2021 BCSC 837 at paras. 187–189 and in *Williamson* at para. 100, affidavits appending reports from government health authorities were admitted under the public document

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> exception. Since *Ernewein*, this Court has repeatedly admitted similar exhibits for similar purposes. There is no reason to depart from that reasoning here.

[93] Respectfully, this misstates the law in this area. The public records exception is not met simply because a record or document is publicly available, even if it is published by a government entity. Nor do the decisions cited by the certification judge support her approach. In *Sharp v. Royal Mutual Funds Inc.*, 2019 BCSC 2357, the documents at issue were being tendered for a purpose other than their truth. They were not hearsay and were not admitted under an exception to the hearsay rule.

[94] Similarly, in *Huebner v. PR Seniors Housing Management Ltd., D.B.A. Retirement Concepts*, 2021 BCSC 837, the judge admitted a report prepared by the Parliamentary Secretary for Seniors to the Ministry of Health not for the truth of its contents, but "to show the Province's state of mind or knowledge about alleged shortcomings of the long-term care facilities in British Columbia": para. 188.

[95] Finally, *Williamson v. Johnson & Johnson*, 2020 BCSC 1746 was concerned with whether the source and content of the documents—not simply their public nature—rendered the information in them reliable. The certification judge found that the documents were reliable because: they flowed from Health Canada's "mandate to prevent and control the use of toxic substances that may endanger human life or health"; were found on its official website; and contained analysis based on the scientific evidence available at the time, "not sweeping or conclusory assertions": para. 95.

[96] In this case, the certification judge did not identify what "report evidence" was admitted under this exception. Therefore, it is not possible to say whether the evidence would have been admissible under an application of the correct test for the public records exception.

[97] I turn now to address whether the matter of admissibility should be remitted to the certification judge below.

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Impact of admitting the non-transcript exhibits to the Dimson affidavits

[98] The improper admission of evidence will only ground a successful appeal if it had an impact on the judgment under review. Where the outcome would have been the same, there is no reason for an appellate court to remit the matter: *Van de Perre v. Edwards*, 2001 SCC 60 at para. 15.

[99] As I explain below, I am of the view that the admissible evidence supports the factual findings made by the certification in relation to material issues and there is no reason to remit the matter in this case.

General factual narrative

[100] The defendants submit that the factual narrative adopted by the certification judge in her decision was based on inadmissible evidence. In particular, they submit that the judge made the following factual findings which were only available to her if the non-transcript exhibits to the Dimson affidavits were relied upon for their truth:

1. Syngenta's corporate predecessor had detected paraquat in animals' brains during internal studies: para. 114.

2. Syngenta was aware of autopsies which showed injuries to the central nervous system of humans after being exposed to paraquat: para. 116.

3. Syngenta had an internal policy to the effect that scientists would not measure paraquat in the brains of study animals: para. 120.

4. Syngenta privately acknowledged that it could not say paraquat does not enter the brain; paraquat does not cause any changes in the brain; paraquat only causes effects in the mouse; mouse data on paraquat are not relevant to humans; people are not exposed to paraquat; there are no data reporting that paraquat may be associated with Parkinson's disease in humans; and the data show that paraquat does not cause Parkinson's disease in humans: para. 121.

[101] The plaintiffs argue that the Botham transcripts provide sufficient support for the above findings. I agree, except for the second item listed above.

[102] On the first item, Dr. Botham's February 2020 deposition evidence supports that ICI had detected paraquat in animals' brains during internal studies. He was taken to a 1973 study on the tissue distribution of paraquat in rats and mice which detected paraquat in the brain tissue of study subjects. He confirmed that this finding was consistent with a previous ICI study which had also detected paraquat in the brains of mice and rats.

[103] Dr. Botham further confirmed in his February 2020 deposition that three Syngenta employees (Nick Sturgess, Louise Marks, and Alison Foster) gave a presentation on paraquat and Parkinson's disease, although he could not recall if he was present at the meeting. Dr. Botham was asked about a line in the presentation, under the heading "Research Activity at Syngenta CTL Strategy Being Followed", which stated "Avoided measuring PQ levels in the brain, since the detection of any PQ in the brain (no matter how small) will not be perceived externally in a positive light". He confirmed that at some point in time, the position of Syngenta scientists involved in paraquat research was that paraquat levels in the brain should not be measured.

[104] Two years later, in Dr. Botham's February 2022 deposition, he was again taken to this presentation and confirmed this policy among researchers studying paraquat at Syngenta.

[105] Finally, Dr. Botham outlined what Syngenta could not say about paraquat and Parkinson's disease, based on available evidence. In his February 2020 deposition, Dr. Botham was taken to a slide deck entitled "Parkinson's disease—What can

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Syngenta say about the issue?" and adopted several of the bullets from this presentation as his evidence:

> Q. And we'll talk about the rest of this as we go through these points. But number 1, the first one says: "Paraquat does not enter the brain."
>
> So, in other words, Syngenta knew, at the time of this point, that paraquat does enter the brain, correct?
>
> A. That's correct, we did.
>
> **Q. And you couldn't say that paraquat does not cause any changes in the brain because you knew that paraquat does cause changes in the brain, right?**
>
> **A. That's right. from the evidence that was available at the time yes.**
>
> Q. Paraquat only, it says, causes effects in the mouse, right?
>
> A. Yes.
>
> Q. So, in other words, if you use the active agreement of paraquat by itself, it will cause effects in the mouse. That's what that means, correct?
>
> A. I think this might mean that paraquat – we're talking here about Parkinson's-like pathology, isn't – the effects are not just seen in the mouse. I think it may have been referring to the fact that there studies in the rat, for example, in the literature.
>
> Q. Oh, okay. That's correct, and I appreciate you pointing that out because it demonstrated that paraquat with rats doesn't seem to cause any effect, correct?
>
> A. Yeah in our hands we didn't see an effect with the rats but –
>
> Q. So you –
>
> A. – obviously other people did.
>
> Q. Okay. But your study showed that you could do this. So what you, in 2007, concluded, that paraquat only causes effects in the mouse in your test animals, not in the rats, correct?
>
> A. Well, this is what we cannot say. So **we can't say that paraquat only causes effects in the mouse because other researchers, although we didn't find anything in the rat, had found effects in the rat.**
>
> That would be my interpretation here.
>
> Q. All right. And the next one says: The mouse data on paraquat are not relevant to humans." You can't say that either, right?
>
> A. At that time, that was absolutely right, yes.
>
> Q. Because mouse data was relevant to humans, correct?
>
> A. **The mouse data could be relevant to humans, yes.**
>
> Q. And it wouldn't be appropriate to say that it wasn't. That's what this says?

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> A. That's right.
>
> Q. Okay. And **you couldn't say people aren't exposed to paraquat either, could you?**
>
> **A. Certainly not, no.**
>
> Q. Because you knew by then, and you'd know known for some period of time back, as you said, in the '90s, I think in your earlier part of the deposition you'd indicated maybe earlier, that people using this, mixing it, loading it, applying it, were certainly exposed to paraquat, correct?
>
> A. Yes, that's correct.
>
> **Q. All right. "There are no data reporting that paraquat may be associated with PD in humans." You can't say that either, right?**
>
> **A. Yes, we can't say that because there were some epidemiology studies with association.**
>
> Q. And that you can't say that the data showed that paraquat does not cause PD in humans either, can you?
>
> **A. In 2007, with the evidence in front of us, that was certainly something that is clear; we could not say definitely that paraquat does not cause Parkinson's disease.**
>
> [Emphasis added.]

[106] The transcripts from Dr. Botham's deposition, which Syngenta concedes were admissible, therefore provide ample support for the certification judge's narrative.

[107] The sole exception is the finding that Syngenta was aware of autopsies showing central nervous system injuries after paraquat exposure. The plaintiffs argue that this finding is supported by Dr. Botham's February 2020 deposition evidence, where he was taken through a series of notes from meetings between Chevron and Syngenta's corporate predecessor on their joint venture selling paraquat in the 1970s. Dr. Botham reviewed notes from an October 1975 meeting which stated that "in a recent autopsy on a paraquat poisoning the pathologist discovered lesions on the motor neurons". The plaintiffs highlight the following passage in particular:

> Q. Now look at the first sentence in paragraph. It says: "ACTIVITY OF PARAQUAT ON [CENTRAL NERVOUS SYSTEM]."
>
> That's the heading, right?
>
> A. Yes.

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> Q. It says: “In a recent autopsy on a paraquat poisoning the pathologist discovered lesions on the motor neurons.”
>
> Did I read that right?
>
> A. Yes.
>
> Q. It also says in paragraph 6: “Fisher has also reported ataxia from paraquat administered by any route ...”
>
> Do you see that?
>
> A. Yes.
>
> Q. Who is Fisher?
>
> A. That’s a good question. I don’t know -- there’s a reference to Dr. Fisher in this document and I don’t know who Fisher is.
>
> Q. Is ataxia a lack of voluntary movements?
>
> A. Ataxia is certainly an effect on the muscles which can result from an effect on the nerves, supply of muscles.
>
> Q. On the central nervous system?
>
> A. Yes
>
> [Emphasis added.]

[108] Dr. Botham is simply being asked to read from a document provided to him. Unlike other parts of his testimony, he does not adopt the statements that were put to him. He testified that he does not remember whether he attended the meeting at which the document purports to be the notes from. Therefore, the certification judge misapprehended the evidence in finding Syngenta knew of autopsies showing central nervous system injuries after paraquat exposure finding. However, in my view, this finding of fact is inconsequential to the decision. It is not used by the certification judge to arrive at a particular conclusion, but as an example of how Syngenta came to be aware of the potential neurotoxicity of paraquat over the time that it sold the Gramoxone Products. The overall factual narrative described by the certification judge remains supported by admissible evidence.

Punitive damages analysis

[109] The certification judge set out the following factual basis for her certification of a common question on punitive damages:

> [183] There is some basis in fact to support the theory that the defendants knew of many of the facts underpinning the link between paraquat and

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> Parkinson's disease, and once published scientific studies were available drawing a connection between paraquat and Parkinson's disease, the defendants took steps to develop and implemented a corporate "influencing" campaign to counter those studies, with a view to countervailing those studies while concealing their internal studies.

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[110] Syngenta submits that this factual narrative is not available on the basis of admissible evidence.

[111] The plaintiffs submit there is "some basis in fact" for the theory articulated above based on the Botham transcripts. Again, I agree.

[112] In Dr. Botham's June 17, 2020 deposition, he gave evidence about the 1999 work of a group of scientists, Dr. Di Monte and Dr. Cory-Slechta, that implicated paraquat in a Parkinson's disease animal model. He testified that this work prompted Syngenta to conduct its own internal studies, completed by Dr. Louise Marks. He confirmed that the Syngenta techno-regulatory team deemed Dr. Cory-Sletcha's research "[t]hreats to paraquat from the scientific literature" and that the techno-regulatory team met in November 2004 to lay out a strategy for responding to the research. Dr. Botham testified about the tactics discussed at this meeting. These tactics included influencing future scientific research on the link between paraquat and Parkinson's disease:

> Q. So one of those tactics was to develop a database of neurotoxicity studies to support the continued regulatory approval of paraquat, wasn't it?
>
> A. That's right.
>
> Q. Another tactic was to influence ongoing academic Parkinson's research, correct?
>
> A. Correct.
>
> Q. Another way was to influence ongoing Parkins's disease research, right? And that meant --
>
> A. That's what it says here, yes.
>
> Q. – influence in a way that supported the continued registration and use of paraquat. That's what it meant. Wasn't it?
>
> A. I think this is where the term "influence" is one which can be – it can defined in different ways. To me, and I think being part of this team, influence was – is more about being able to engage with people like the academic community so that we can better understand what is actually [happening] here with paraquat and potential Parkinson's

> disease. It was not meant to say we're trying to suppress or bad-mouth the research that has been done.

[113] Dr. Botham also testified that Louise Marks' studies were not initially shared with regulators:

> Q. And 16 years after her studies were done, you sent them to the US EPA, didn't you?
>
> A. That is correct. Yes, in 2019 information on those studies was sent to the EPA.

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[114] Dr. Botham testified that, although there was a requirement that Syngenta report Dr. Marks's conclusions and opinions if "the information was <u>relevant</u> to the assessment of the risks or benefits" of paraquat, the studies were not sent to regulators because of "the way in which we had defined 'relevant' at the time the studies were done".

[115] In my view, these passages from the Botham transcripts provide support for the certification judge's finding that there was some basis in fact that Syngenta sought to influence research on a potential link between paraquat and Parkinson's disease, while concealing its own internal studies on the issue.

[116] In conclusion, although the Dimson exhibits should not have been admitted in the manner they were, all key findings of fact made by the trial judge are supported by admissible evidence. I see no basis to interfere with any of these findings and no reason to remit the matter back to the certification judge.

Certification of remedial common issues

[117] Turning to the final ground of appeal, Syngenta argues that the certification judge erred in certifying common issues on the remedies of restitution, general damages, and health care cost recovery.

Is restitution an appropriate remedy?

[118] Syngenta and the plaintiffs agree that it was an error for the certification judge to certify a common issue on restitution, given that she did not certify the proposed issue on unjust enrichment.

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[119] However, the plaintiffs submit that this error simply reflects a clerical error, and the certification judge intended to certify a common issue on disgorgement. The plaintiffs submit that it is within this Court's jurisdiction to correct this error, and it should do so.

[120] Syngenta disagrees. It submits that even if the judge intended to certify a common issue on disgorgement, this Court should not allow such a common issue to stand because disgorgement is not an appropriate remedy for negligence, the only remaining certified cause of action.

[121] I note that the certification judge appears to use the terms "restitution" and "disgorgement" interchangeably in her analysis:

> [186] The plaintiffs also seek disgorgement as an alternative to compensatory damages. In *Atlantic Lottery*, the majority of the Supreme Court of Canada held that disgorgement remedies were available for "deceit": at para. 36.
>
> [187] While the Gramoxone Products worked well as herbicides, the purpose for which they were purchased and utilized, the claim in this case pleads deceptive conduct by the defendants. The Court in *Atlantic Lottery* clarified that disgorgement "refers to awards that are calculated exclusively by reference to the defendant's wrongful gain": *Atlantic Lottery* at para. 23.
>
> [188] There is some basis in fact that the proposed issue can be answered on a class-wide basis. It is concerned with the <u>restitution of money unjustly received</u> by the defendants from the sale of Gramoxone Products to the Class by way of deceit, rather than the Class Members' individual damages or losses.
>
> [Emphasis added.]

[122] In *Atlantic Lottery Corp. Inc. v. Babstock,* 2020 SCC 19, the Supreme Court of Canada commented that using the terms restitution and disgorgement interchangeably has created confusion. The Court clarified that the cause of action sometimes known as "restitution" should instead be called "unjust enrichment".

Restitution and disgorgement are different remedies. An award focused on restitution is aimed at restoring a benefit to the plaintiff wrongfully taken from her. Disgorgement, in contrast, is "calculated exclusively by reference to the defendant's wrongful gain, irrespective of whether it corresponds to damage suffered by the plaintiff": para. 23. Neither is an independent cause of action: para. 27.

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[123] An underlying rationale for granting disgorgement as a remedy is that wrong-doers should be prevented from retaining profits gathered from their wrong-doing. This rationale was explained by Justice Binnie in *Strother v. 3464920 Canada Inc.*, 2007 SCC 24:

> [77] The concept of the *prophylactic* purpose is well summarized in the Davis factum as follows:
>
> > [W]here a conflict or significant possibility of conflict existed between the fiduciary's duty and his or her personal interest in the pursuit or receipt of such profits . . . equity requires disgorgement of any profits received even where the beneficiary has suffered no loss because of the need to deter fiduciary faithlessness and preserve the integrity of the fiduciary relationship. [Emphasis omitted; para. 152.]
>
> Where, as here, disgorgement is imposed to serve a prophylactic purpose, the relevant causation is the breach of a fiduciary duty and the defendant's gain (not the plaintiff's loss). Denying Strother profit generated by the financial interest that constituted his conflict teaches faithless fiduciaries that conflicts of interest do not pay. The prophylactic purpose thereby advances the policy of equity, even at the expense of a windfall to the wronged beneficiary.

[124] The focus in ordering disgorgement is not on the plaintiff, but on the defendant's actions. Typically, the type of conduct which warrants disgorgement is conduct that is wrong in itself—for example, breach of a fiduciary duty. For this reason, considerable doubt has been expressed in legal commentary about whether disgorgement could be a remedy for negligence, because the creation of risk is not wrong in itself: see Greg Weber, "Waiver of Tort: Disgorgement Ex Nihilo" (2014) 40:1 Queen's LJ 389.

[125] A second reason for being skeptical of the availability of disgorgement as a remedy for negligence is that negligence focuses on the harm to the plaintiff, while disgorgement is aimed at the defendant's gains. This tension was described in *Reid v. Ford Motor Company*, 2006 BCSC 712, which rejected a "waiver of tort" pleading in a negligence class action:

> [27] This action does not fall into the types of cases where waiver of tort has been applied and there is no principled basis on which to apply it in this case. …
>
> …
>
> [29] In *Networth* [*Industries Ltd. v. Cape Flattery (The)*, [1997] B.C.J. No. 3174 (S.C.), citing *Pettkus v. Becker*, 1980 CanLII 22 (SCC), [1980] 2 S.C.R. 834] Lowry J. (as he then was) noted at ¶ 24 – 26 that there has never been a case of unjust enrichment grounded in negligence. The torts supporting a claim for unjust enrichment have been for the most part proprietary torts such as conversion or trespass to land and goods which have been described as "anti-enrichment wrongs". Restitutionary claims are not made in negligence and nuisance because they are in the main "anti-harm wrongs" in relation to which it is impossible, even if they lead to an enrichment of the wrongdoer, to elevate the prevention of enrichment to the level of a primary purpose.
>
> [Emphasis added.]

[126] In *Atlantic Lottery*, the Supreme Court of Canada declined to decide whether disgorgement could be available as a remedy for negligence:

> [36] The Court of Appeal majority concluded that, even if disgorgement for wrongdoing is not an independent cause of action, the plaintiffs have adequately pleaded the elements of the tort of negligence, and may therefore seek disgorgement for tortious wrongdoing on that basis. While disgorgement for tortious wrongdoing was initially applied only in the context of proprietary torts, including conversion, deceit, and trespass, it found broader application in the late 20th century (Martin, at pp. 505-6). It has even been suggested that disgorgement may be available for negligence in certain circumstances, and the issue remains unsettled (Edelman, at pp. 129-30; C.-M. O'Hagan, "Remedies", in L. N. Klar et al., eds., *Remedies in Tort* (loose-leaf), vol. 4, at §200). While that may have to be decided in an appropriate case, as I will explain the plaintiffs have not adequately pleaded a claim in negligence, and it is unnecessary to resolve the question here.
>
> [Emphasis added.]

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[127] In any event, the plaintiffs did not argue on certification that disgorgement should be available for negligence. Instead, in their proposed common issues, the plaintiffs expressly link the remedy of disgorgement to their unjust enrichment claim:

> b. were the Defendants unjustly enriched? if so, is disgorgement an appropriate remedy?
>
> c. is restitution an appropriate remedy?

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[128] Although the certification judge rejected a common issue in unjust enrichment, she nevertheless certified a common issue on the appropriateness of disgorgement as a remedy:

> [186] The plaintiffs also seek disgorgement as an alternative to compensatory damages. In *Atlantic Lottery*, the majority of the Supreme Court of Canada held that disgorgement remedies were available for "deceit": at para. 36.
>
> [187] While the Gramoxone Products worked well as herbicides, the purpose for which they were purchased and utilized, the claim in this case pleads deceptive conduct by the defendants. The Court in *Atlantic Lottery* clarified that disgorgement "refers to awards that are calculated exclusively by reference to the defendant's wrongful gain": *Atlantic Lottery* at para. 23.
>
> [188] There is some basis in fact that the proposed issue can be answered on a class-wide basis. It is concerned with the restitution of money unjustly received by the defendants from the sale of Gramoxone Products to the Class by way of deceit, rather than the Class Members' individual damages or losses.

[129] Respectfully, *Atlantic Lottery* does not stand for the proposition that disgorgement is available for negligence where it involves deceitful conduct. On my reading, by "deceit", the Court was referring to the tort of civil fraud:

> [36] … While disgorgement for tortious wrongdoing was initially applied only in the context of proprietary torts, including conversion, deceit, and trespass, it found broader application in the late 20th century (Martin, at pp. 505-6). …
>
> [Emphasis added.]

[130] The terms "deceit" and "civil fraud" are used interchangeably to refer to the same tort: *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8 at para. 18.

[131] In the face of serious doubt about the availability of disgorgement in negligence claims, the plaintiffs have not provided a rationale for why this remedy should be extended in this novel way.

[132] In my view, in the absence of such a rationale, this remedial question should not have been certified. While it is not determinative on a certification application that the law has not yet recognized the availability of a particular remedy, courts play an important gatekeeping function in determining which issues should be certified. As explained in *Atlantic Lottery*:

> [19] … The law is not static, and novel claims that might represent an incremental development in the law should be allowed to proceed to trial (*Imperial Tobacco*, at para. 21; *Das v. George Weston Ltd.*, 2018 ONCA 1053, 43 E.T.R. (4th) 173, at para. 73; see also *R. v. Salituro*, 1991 CanLII 17 (SCC), [1991] 3 S.C.R. 654, at p. 670). That said, a claim will not survive an application to strike simply because it is novel. It is beneficial, and indeed critical to the viability of civil justice and public access thereto that claims, *including novel claims*, which are doomed to fail be disposed of at an early stage in the proceedings. This is because such claims present "no legal justification for a protracted and expensive trial" (*Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83, at para. 19). If a court would not recognize a novel claim when the facts as pleaded are taken to be true, the claim is plainly doomed to fail and should be struck. In making this determination, it is not uncommon for courts to resolve complex questions of law and policy (see e.g. *Imperial Tobacco*; *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537; *Syl Apps*; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261).
>
> [Emphasis added.]

[133] Allowing claims to proceed without a sufficient rationale or doctrinal basis leaves the law unsettled, to the disadvantage of all parties. This was the case for the concept of "waiver of tort", before it was put to rest in *Atlantic Lottery*:

> [22] … failing to address whether an independent cause of action for waiver of tort exists will perpetuate an undesirable state of uncertainty. As Greg Weber writes, "[w]aiver of tort has become a hollow and internally inconsistent doctrine, leaving judges and litigants confused about how and when a cause of action might support disgorgement" (p. 392). Uncertainty about whether an action lies for disgorgement without proof of damage has significant ramifications, which are most apparent in the context of class actions. For 16 years since *Serhan (Estate Trustee) v. Johnson & Johnson* (2004), 2004 CanLII 1533 (ON SC), 72 O.R. (3d) 296 (S.C.), such claims have been commonly advanced but never fully tried. In the meantime, certification judges have had "little alternative but to affirm that the question of

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> the doctrine's availability is indeed a live issue for trial, which can and does result in certification to the detriment of the defendant, who is then practically compelled to pay a settlement to the plaintiff" (J. M. Martin, "Waiver of Tort: An Historical and Practical Survey" (2012), 52 *Can. Bus. L.J.* 473, at p. 476 (footnote omitted); see also H. M. Rosenberg, "Waiving Goodbye: The Rise and Imminent Fall of Waiver of Tort in Class Proceedings" (2010), 6 *Can. Class Action Rev.* 37, at p. 38). Indeed, this Court's decision to refrain from striking the waiver of tort claim in *Microsoft* has been taken as an affirmative statement that such claims are viable (see e.g. C.A. Reasons, at para. 182; *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187, 25 B.C.L.R. (6th) 268, at para. 73; *Authentic T-Shirt Co. ULC v. King*, 2016 BCCA 59, at paras. 41-42 (CanLII)). Nothing is gained, and much court time and considerable litigant resources are lost, by leaving this issue unresolved.
>
> [Emphasis added.]

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[134] In my view, it is plain and obvious that disgorgement is not available to the plaintiffs here, and, respectfully, it was an error of law to certify a common issue on this question.

Is an award of general damages appropriate based on a sampling of harm?

[135] The certification judge certified a common issue on general damages, relying on *Good v. Toronto (Police Services Board),* 2016 ONCA 250. There, the Ontario Court of Appeal agreed with the certification of issues assessing a base amount of non-pecuniary general damages for breach of *Charter* rights, based on a sampling of the harm experienced by individual class members.

[136] Syngenta submits that this question should not have been certified as a common issue. It submits that the rationale in *Good* does not apply here, because, unlike in negligence claims, damages for breach of *Charter* rights may be awarded for purposes other than compensation, such as vindication or deterrence. Because of these additional purposes, it may be possible to quantify a minimum damage award for *Charter* claims on a class-wide basis. Syngenta submits that claims for negligence are distinct because plaintiffs must establish liability by proving both general and specific causation before a damage award is quantifiable, the latter of which cannot be decided on a class-wide basis.

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[137] The plaintiffs submit that the certification judge was correct in certifying this question. They submit that the approach of assessing base amounts of non-pecuniary general damages, based on sampling of the claim members' harm, promotes judicial economy, while preserving flexibility to account for individual circumstances by awarding further damages in individual trials dealing with specific causation. They submit that this case is distinct from other cases where questions relating to general damages have not been certified, because in this case, if the plaintiff's expert evidence is accepted, specific causation will be "presumptively proven". They rely on *Andersen v. St. Jude Medical*, *Inc.,* 2012 ONSC 3660, where Justice Lax wrote:

> [556] Where the epidemiological evidence demonstrates a risk ratio above 2.0, then individual causation has presumptively been proven on a balance of probabilities, absent evidence presented by the defendant to rebut the presumption. On the other hand, where the risk ratio is below 2.0, individual causation has presumptively been disproven, absent individualized evidence presented by the class member to rebut the presumption. That is, whether or not the risk ratio is above 2.0 determines upon whom the evidentiary responsibility falls in determining individual causation. *Daubert II* and *Hanford Nuclear* also support the use of a risk ratio of 2.0 as a presumptive threshold in the manner practiced by the WSIAT.

[138] In sum, the plaintiffs raise two arguments with respect to how the question of damages could be answered on a class-wide basis. From *Andersen,* specific and general causation can be answered with a single general inquiry so long as the risk caused by a given substance is high enough. From *Good,* non-pecuniary general damages can be determined based on a sampling of the harm experienced by individual class members.

[139] Neither of these arguments can succeed based on this Court's reasoning in *Stanway v. Wyeth Canada Inc.*, 2012 BCCA 260, where the Court discussed the division between general and specific causation:

> [53] As the Court observed in *Harrington*, the division between general and specific causation affects certification. This division is examined in an article by Patrick Hayes entitled *Exploring the Viability of Class Actions Arising from Environmental Toxic Torts: Overcoming Barriers to Certification*, 19 J. Env. L. & Prac. 190 at 195:

> Proving causation in the context of toxic substances, however, puts the added burden on plaintiffs to establish two types of causation, both general and specific. This is because, unlike the causal connection between being hit by a car and suffering a broken bone, for instance, the causal connection between a toxic substance and a disease is not as easy to decipher. Thus, a plaintiff must first prove "general" or "generic" causation--that a particular substance is capable of causing a particular illness. The issue must be addressed, whether explicitly or implicitly, in toxic torts litigation, since it is axiomatic that "an agent cannot be considered to cause the illness of a specific person unless it is recognized as a cause of that disease in general." Next, a plaintiff must prove "specific" or "individual" causation--that exposure to a particular toxic substance did, in fact, cause the plaintiff's illness.

[Emphasis added.]

[140] This Court concluded that the burden of proving specific causation is on the plaintiff.

[141] Both parties agree that specific causation cannot be determined at a common issues trial. It follows that the question of specific causation cannot be addressed via a common issue, regardless of the risk that paraquat may create, or the harm experienced by a certain sample size of individuals. I agree with Syngenta that, as a result, the question on damages should not have been certified.

[142] The Ontario Court of Appeal's decision in *Good* is distinguishable because, as the Supreme Court of Canada held in *Vancouver (City) v. Ward,* 2010 SCC 27, a claim for damages under the *Charter* is of a different nature than is a claim for damages in tort: para. 22. As Syngenta points out, damages in the *Charter* context may serve purposes beyond compensation—they also may be awarded to vindicate *Charter* rights and deter state misconduct: *Ward* at para. 4. Because of this, a "base amount" quantum of damages can be determined without knowing the level of harm caused by the misconduct to each individual—for instance, it could be reflective of the need to deter state misconduct of the sort. That is not so in the case at bar.

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[143] Respectfully, the certification judge erred in principle by holding that the appropriateness of general damages could be determined without determining specific causation. It was an error to certify a question on whether an award of damages is appropriate.

Would the defendants' conduct justify an award of punitive, aggravated or exemplary damages?

[144] Punitive damages are awarded in "exceptional cases for 'malicious, oppressive and high-handed misconduct' that 'offends the court's sense of decency'": *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para. 36, quoting *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 196, 1995 CanLII 59. As the name suggests, the aim of punitive damages is to punish the defendant rather than compensate the plaintiff.

[145] This rationale was explained by Binnie J. in *Whiten*:

> [37] Punitive damages serve a need that is not met either by the pure civil law or the pure criminal law. In the present case, for example, no one other than the appellant could rationally be expected to invest legal costs of $320,000 in lengthy proceedings to establish that on this particular file the insurer had behaved abominably. Over-compensation of a plaintiff is given in exchange for this socially useful service.

[146] Exemplary damages are another term for punitive damages: *Whiten* at paras. 47–49.

[147] Aggravated damages are similar to punitive damages, but are compensatory in nature. They are awarded when the reprehensible or outrageous conduct of the defendant causes the plaintiff additional harm by distressing them: see *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 SCR 1085, 1989 CanLII 93.

[148] Syngenta submits that the above question on punitive and aggravated damages is premature, because these remedies are only available in cases where a plaintiff has proven liability and established entitlement to compensatory damages. They further submit that there was no admissible evidence to show "some basis in fact" to support that Syngenta acted in an oppressive and high-handed manner.

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[149] The plaintiffs submit that the question on punitive damages is consistent with an often-adopted bifurcated approach in class proceedings. The question separates whether the defendants' *conduct* warrants an award of punitive damages from whether an award of punitive damages should be made, leaving the latter determination for individual trials.

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[150] The plaintiffs further argue that aggravated damages claims may also be bifurcated. At the common issues trial, the question of whether the conduct is "reprehensible or outrageous" can be answered, leaving the question of harm to a specific class member's feelings to individual trials.

[151] I agree with the plaintiffs that the certification judge was correct in finding that the question on punitive damages could be answered on a class-wide basis. While the plaintiffs' ultimate entitlement to punitive damages will depend on their ability to show that they are individually entitled to compensatory damages, whether Syngenta's conduct meets the threshold for punitive damages can be determined in common and will assist in moving the litigation forward. Like in *Rumley v. British Columbia*, 2001 SCC 69, the focus here is on the "overall culpability of the defendant" which "does not have to be linked to the harm caused to any particular claimant and does require individualized assessment": paras. 19, 34.

[152] As I have set out, the plaintiffs have introduced admissible evidence, in the form of the Botham transcripts, which provides some evidence that Syngenta acted in an oppressive and high-handed manner by making claims that were undermined by its own studies and by attempting to influence the scientific consensus on the dangers of paraquat.

[153] However, in my view, the aggravated damages question should not have been certified. As explained in *Gomel v. Live Nation Entertainment, Inc.*, 2021 BCSC 699, rev'd in part (but not on this point) 2023 BCCA 274:

> [168] As to aggravated damages, the plaintiffs have not pleaded any material facts supporting such an award. Further, **aggravated damages are generally unsuitable for determination as a common issue**. By their very nature, they require an individual inquiry into the additional harm caused to

> the plaintiff's feelings or emotional stress by reprehensible or outrageous conduct on the part of the defendant: *Carom v. Bre-X Minerals Ltd.* (1999), 1999 CanLII 14794 (ON SCDC), 44 O.R. (3d) 173 (Gen. Div.) at para. 83; *Kotai v. "Queen of the North"*, 2007 BCSC 1056 at paras. 40-42; *Ladas v. Apple Inc.,* 2014 BCSC 1821 at para. 187.
>
> [Emphasis added.]

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[154] The question of whether the defendant's conduct justifies an award of aggravated damages is not a certifiable question, since aggravated damages are compensatory and therefore require an assessment of the plaintiff's harm before any entitlement can be determined.

[155] In conclusion, the above question should be amended so that the reference to aggravated damages is struck.

Are the defendants liable to pay subrogated health care costs to provincial health care insurers?

[156] Syngenta submits that this question is premature and cannot be answered on a class-wide basis. They submit that the plaintiffs cannot establish liability to any particular class member based on the certified common issues, because specific causation cannot be proven at the common issues trial. Therefore, it is impossible to determine if Syngenta is liable for subrogated health care costs before determining if it is liable to the plaintiffs in negligence.

[157] The plaintiffs disagree. They say that statutes like the *Health Care Costs Recovery Act,* S.B.C. 2008, c. 27 [*HCCRA*] do not require an independent finding of liability as a pre-requisite to recovery. They submit that the *HCCRA* creates a distinct cause of action for breach of both common law and statutory duties. Pleading negligent design and failure to warn supports a claim under the *HCCRA*, even in a case where specific causation is not a common issue.

[158] It is worth reiterating that the proposed class is a national class, so British Columbia's *HCCRA* is not the applicable legislation for all class members.

[159] Nevertheless, considering the terms of the *HCCRA*, I do not view the plaintiffs' interpretation as supported by the words of the statute.

[160] The *HCCRA* creates a cause of action for plaintiffs in personal injury cases to recover for healthcare costs incurred by the provincial government. On a plain reading of the *HCCRA*, it requires a defendant to have caused a plaintiff's injury to be liable for health care costs. The cause of action created under s. 2(1) applies only where a beneficiary suffers a personal injury "*as a direct or indirect result* of the negligence or wrongful act or omission of the wrongdoer". The term wrongdoer is also defined in s. 1 of the *HCCRA* by reference to causation:

> **"wrongdoer"** means
>
> (a) a person whose negligent or wrongful act or omission *causes or contributes* to a beneficiary's personal injury or death, and
>
> (b) a person who is responsible at law for the acts or omissions of a person referred to in paragraph (a),
>
> but does not include the beneficiary.

[161] Causation is therefore an essential element for liability under the *HCCRA*. The question of whether Syngenta caused the plaintiffs' personal injuries needs to be answered before its liability for subrogated healthcare costs can be determined. The plaintiffs concede that, in this case, specific causation cannot be proven at a common issues trial. Therefore, it was an error to certify the question of whether Syngenta is liable for subrogated healthcare costs, since this question cannot be answered in common across the class.

[162] This is not to say that questions on subrogated healthcare costs can never be certified as common issues in class proceedings. For example, in product liability cases, questions have been certified about whether the harm the plaintiffs complain of, as a result of the defendant's conduct, could qualify as a "personal injury": *MacKinnon v. Pfizer Canada Inc.*, 2021 BCSC 1093 at paras. 151–154, rev'd 2022 BCCA 151, but not on this point; *Bowman v. Kimberly-Clark Corporation*, 2023 BCSC 1495 at paras. 198–201. In certain circumstances, questions such as this could be helpful in moving the litigation forward, even in cases where specific causation cannot be proven on a class-wide basis. In my view, however, that is not so in this case for the reasons discussed.

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Conclusion

[163] The appeal is allowed, in part.

[164] The certification judge erred in certifying common issues related to battery, general damages, restitution, aggravated damages, and in subrogated health care recovery costs. In reference to Appendix A to these reasons, I would allow, in part, Syngenta's appeals and conclude that the following issues should not have been certified: 2(j); 4(a)–(c); 4(d) solely as it relates to aggravated damages; and 4(e).

[165] I would dismiss Syngenta's remaining grounds of appeal.

"The Honourable Justice MacNaughton"

I AGREE:

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Justice Fleming"

Appendix A: Common Issues

1. Can exposure to Gramoxone Products cause or contribute to Parkinson's Disease?

2. If the answer to question (1) is 'yes':

Duty to Warn

a. when did the Defendants know, or when ought the Defendants have known, of this causal relationship or association?

b. did the Defendants have a duty to warn the Class Members of the risks of Parkinson's disease associated with the Gramoxone Products?

c. did the Defendants breach their duty to warn the Class Members of risk described in (1) associated with the Gramoxone Products?

d. if the answer to question 2(c) is yes, when did the breach of duty occur?

Negligent Design

e. were the Defendants negligent in failing to conduct reasonable research, investigation and testing of the Gramoxone Products in relation to the risk described in (1)?

f. does the risk described in (1) make the Gramoxone Products unfit for their intended use?

g. if the answer to 2(f) is yes, does this constitute a design defect?

h. do the Defendants owe a duty of care to the Class Members with respect to the research, investigation, and testing of the Gramoxone Products?

i. did the Defendants breach the standard of care with respect to the design, development and/or testing of the Gramoxone Products?

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Battery

j. did the Defendants commit battery against the Class Members, or any of them?

3. Are the Defendants vicariously liable for the acts and omissions of their officers, director, agents, employees, and representatives?

4. If the answers to any of the above questions are “yes”:

a. is an award of damages appropriate?

b. were the Defendants unjustly enriched? if so, is disgorgement an appropriate remedy?

c. is restitution an appropriate remedy?

d. would the Defendants’ conduct justify an award of punitive, aggravated, or exemplary damages?

e. are the Defendants liable to pay subrogated health care costs to provincial health care insurers?

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